Supreme Court, U.S.
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In The

Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
Mississippi Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*.

2. Whether state certification in the absence of unusual circumstances should be preferred to abstention under *Railroad Commission v. Pullman Company*.

LIST OF PARTIES

The names of all Petitioners are as follows:

Brian Moore.

The names of all Respondents are as follows:

Delbert Hosemann, in his official capacity as Mississippi Secretary of State.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Moore, petitions the Court for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit (entered December 18, 2009 with rehearing denied on January 18, 2010), reversing in part and affirming in part the District Court's dismissal of Petitioner's complaint under Federal Rule of Civil Procedure 12(c) and denying Petitioner's motion for costs and attorney's fees under Federal Rule of Civil Procedure 4(d).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Jones, C.J., Smith and DeMoss, JJ.) is reported at 591 F.3d 741 (5th Cir. 2009), and is included in the Appendix (App., *infra*, at 1). The final judgment of the United States District Court for the Southern District of Mississippi is not reported and is reproduced in the Appendix (App., *infra*, at 14). The order of the District Court denying Petitioner's motion for costs and attorney's fees is not reported and is reproduced in the Appendix (App., *infra*, at 24).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 18, 2009. Rehearing was denied on January 18, 2010.

See App., *infra,* at 26. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

U.S. Const., art. II, § 1, cl. 2:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, ...

Miss. Code § 23-15-785(2):

> The certificate of nomination by a political party convention must be signed by the presiding officer and secretary of the convention and by the chairman of the state executive committee of the political party making the nomination. Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners. Such certificates and petitions must be filed with the State Board of Election Commissioners by filing the same in the office of the Secretary of State not less than sixty (60) days previous to the day of the election.

Federal Rule of Civil Procedure 4(d):

> **Waiving Service.**
>
> (1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the

summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons.

. . .

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

. . .

Federal Rule of Civil Procedure 4(e):

Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Federal Rule of Civil Procedure 4(j):

Serving a Foreign, State, or Local Government.

. . .

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

STATEMENT OF THE CASE

Mississippi's legislature has provided that presidential candidates must qualify with its secretary of state "not less than sixty (60) days previous to the day of the election." Miss. Code § 23-15-785(2). For the November 2008 presidential election, this meant that candidates were required to file by September 5, 2008.

Unlike a number of election deadlines in Mississippi,[1] § 23-15-785(2) of the Mississippi Code does not include a specific time. It does not, for example, require that candidates file before 5:00 PM; nor does it require that they file by the "close of the business day."

Contrary to § 23-15-785(2)'s plain wording, Respondent, Mississippi's secretary of state, demanded that presidential candidates qualify by 5:00 PM on September 5, 2008. Because Moore, who was the 2008 presidential candidate for the Socialist Party USA,[2] attempted to file just minutes after the secretary's

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[1] Section 23-15-853(2) of the Mississippi Code, for example, requires that *congressional* candidates "qualify with the Secretary of State by 5:00 p.m. not less than twenty (20) days previous to the date of the election."

[2] Because the Socialist Party USA was not recognized in Mississippi, Moore ran under the Natural Law Party's banner. The Natural Law Party and Moore's vice-presidential candidate were also plaintiffs. Only Moore appealed the District Court's dismissal.

5:00 PM deadline on September 5, 2008, he was excluded from Mississippi's presidential ballot.

Moore brought suit under 42 U.S.C. § 1983 on September 16, 2008. In addition to preliminary relief, Moore requested permanent and declaratory relief invalidating the secretary's 5:00 PM deadline. Respondent was sued in his official capacity; Moore did not name Mississippi as a defendant.

Moore argued that the secretary lacked authority under Article II of the United States Constitution to regulate presidential elections. Section 1 of Article II states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, ..." U.S. Const., art. II, § 1, cl. 2. *See Bush v. Gore,* 531 U.S. 98, 112 (2000) (C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (per curiam) ("in the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution").[3] Because of Article II, Moore argued,

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[3] *See also California Democratic Party v. Jones,* 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) (questioning whether California initiative regulating congressional elections "in which popular choices regarding the manner of state elections are

(Continued on following page)

the secretary could not add to or alter the legislature's plain deadline. *See, e.g., Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012-13 (S.D. Ohio 2008) (holding that Ohio's secretary of state violated Article II by creating presidential deadline).

The District Court denied preliminary relief on September 29, 2008, and the Fifth Circuit refused an emergency stay on October 6, 2008.[4] Moore's name therefore did not appear on Mississippi's ballot.

On March 10, 2009, the District Court concluded that Moore's suit was moot and dismissed his complaint. App., *infra*, at 23. It rejected Moore's argument that the controversy fell into the well-recognized "capable of repetition" exception, explaining that "there is no 'reasonable expectation' or 'demonstrated probability' that these plaintiffs . . . will again miss what they now know to be the 5:00 p.m. deadline for filing their qualifying papers." App., *infra,* at 20-21.

On April 9, 2009, Moore filed his notice of appeal. On that same day, Moore moved the District Court to award costs and attorney's fees under Federal Rule of Civil Procedure 4(d). Moore had requested that the

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unreviewable by independent legislative action . . . [are] a valid method of exercising the power that [Article I] vests in state 'Legislature[s]'").

[4] Moore and his co-plaintiffs on December 4, 2008 voluntarily dismissed their interlocutory appeal and request for emergency relief pending in the Fifth Circuit.

secretary waive service of process. The secretary refused. Moore therefore duly served the secretary as an individual under Rule 4(e) and sought reimbursement under Rule 4(d).

The District Court on May 14, 2009, denied Moore's motion for costs as being "patently without merit." App., *infra*, at 24. Moore on June 1, 2009, amended his notice of appeal to include this May 14 order. The two appeals were consolidated in the Fifth Circuit.

The consolidated appeal was argued on November 4, 2009. The Fifth Circuit, in an opinion by Judge Smith, on December 18, 2008 reversed the lower court's dismissal but affirmed its denial of costs. App., *infra*, at 1. Judge Smith ruled that because Moore's action against the secretary was an action against Mississippi, Rule 4(j) applied. And because Rule 4(e) did not apply, Judge Smith concluded that Rule 4(d)'s waiver requirement did not apply either. *See* App., *infra*, at 13.

The court further announced *sua sponte* its intention to abstain from reaching the merits of Moore's controversy under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). App., *infra*, at 8. It also "urge[d] the district court to consider whether

to abstain on the basis of" *Pullman*, too. App., *infra*, at 8.[5]

Because *Pullman* abstention was not argued in the briefs nor addressed during oral argument, Moore petitioned for rehearing to suggest that the panel certify to the Mississippi Supreme Court the following question:

> Whether § 23-15-785(2) of the Mississippi Code requires that a recognized political party's presidential candidate's "qualifying papers" be delivered to the Mississippi Secretary of State by 5:00 PM on the day that is "sixty (60) days previous to the day of the [presidential] election."[6]

The panel denied rehearing without opinion on January 18, 2010. *See* App., *infra*, at 26-27. On

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[5] *Pullman* abstention orders are final and appealable. *See Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 714 & n. 2 (1962) (holding that *Pullman* abstention order is final and appealable); *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 8 (1983) (observing that the lower court in *Idlewild* "stayed the federal suit under the *Pullman* abstention doctrine. We held that the District Court's action was final and therefore reviewable by the Court of Appeals.") (footnote omitted).

[6] Mississippi Rule of Appellate Procedure 20(a) authorizes certification of state-law issues by the Supreme Court and United States Courts of Appeals to the Mississippi Supreme Court. *See generally Government Employees Insurance Co. v. Brown*, 446 So.2d 1002 (Miss. 1984); *Boardman v. United Services Auto Ass'n*, 470 So.2d 1024 (Miss. 1985). District Courts cannot certify issues to the Mississippi Supreme Court.

February 8, 2010, the District Court *sua sponte* abstained under *Pullman*, thereby forcing Moore to file a new round of litigation in state court.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Over Whether Rule 4(e) Applies to State Officials Sued in Their Official Capacities for Prospective Relief Under 42 U.S.C. § 1983.

Rule 4(d) of the Federal Rules of Civil Procedure requires that defendants either waive service of process or suffer the plaintiff's costs. *See* Fed. R. Civ. P. 4(d)(2). Not all defendants, however, are required to waive service. According to Rule 4(d), only those defendants subject to service under Rules 4(e), (f), and (h) are subject to this duty. In particular, the United States, which must be served under Rule 4(i), is not subject to Rule 4(d). Likewise, state and local governmental defendants "subject to suit" are served under Rule 4(j).

The First and Second Circuits have concluded that state officials sued in their official capacities for prospective relief under 42 U.S.C. § 1983 are subject to service as individuals under Rule 4(e). The First Circuit explained in *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 29 (1st Cir. 1988), that official-capacity claims against state officials are governed by

the Rule applicable to individual service, at that time Rule 4(d)(1):[7]

> Although we imagine that in most or all cases where a state officer is sued in his official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state. *See Ex Parte Young*, 209 U.S. 123 (1908).

The court explained that "[i]f the Eleventh Amendment bars an action against the state, then the latter is not 'subject to suit' pursuant to Rule 4(d)(6), and thus the rule is inapplicable." *Id.* (citing C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE & PROCEDURE § 1110 (1987)).[8] The court therefore concluded:

> The action is against an individual, albeit in his official capacity, and not against the state. Although the state . . . has a great interest in the outcome, it will be the individual . . . who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. . . . We therefore hold that service

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[7] Rule 4(d)(1)'s requirements for individual service are now included in Rule 4(e). *See Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003).

[8] Rule 4(d)(6)'s provisions for serving government are now included in Rule 4(j).

> upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).

Id. at 29-30.

The First Circuit reiterated this conclusion in *Caisse v. DuBois*, 346 F.3d 213 (1st Cir. 2003), a § 1983 prison conditions action filed against state corrections officers in both their individual and official capacities. The First Circuit expressly rejected the claim that Rule 4(j) applied: "service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals." *Id.* at 216. The Court accordingly ruled that "to serve the defendants in either an individual or official capacity, [the plaintiff] had to comply with Fed. R. Civ. P. 4(e) providing for service of process on individuals." *Id.*

The Second Circuit has endorsed this result. In *Stoianoff v. Commissioner of Motor Vehicles*, 2000 WL 287720, 208 F.3d 204 (2d Cir. 2000) (Table), where a *pro se* plaintiff failed to comply with Rule 4(j) when serving a state official sued in his official capacity, the Second Circuit observed that "service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. *See, e.g.*, *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28-30 (1st Cir. 1988) (holding that service on state

officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e).").[9]

The Fifth Circuit expressly rejected the First Circuit's interpretation of Rules 4(e) and 4(j). *See* App. *infra*, at 12. It instead drew an equation between suits against federal agents, which are subject to the service requirements of Rule 4(i),[10] and suits against state officers.[11] *See* App., *infra*, at 12. "[T]he most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position." App., *infra*, at 12.

As pointed out by the First Circuit in *Echevarria-Gonzalez,* 849 F.2d at 29, this logic ignores the plain

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[9] Several District Courts have held that because Rule 4(e) applies to official-capacity actions under § 1983, Rule 4(d)(2)'s waiver requirement also applies. *See, e.g., Marcello v. Maine*, 238 F.R.D. 113, 115 (D. Me. 2006) (holding that § 1983 action against a state judge in his official capacity was governed by Rule 4(e) and hence Rule 4(d)); *Whatley v. District of Columbia*, 188 F.R.D. 1, 2 (D.D.C. 1999) (holding that "municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their individual and official capacities"); *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282, 283-84 (D. Neb. 2000) (same).

[10] Rule 4(i)(2) provides that when a federal officer is sued in an official capacity, the United States must be served under Rule 4(i)(1).

[11] It also relied on decisions from several District Courts holding that Rule 4(j) applies to official-capacity actions. *See* App., *infra*, at 13 n. 6. These decisions conflict with those listed in note 9, *supra*.

language of Rule 4(j), which requires that state governmental defendants must be "subject to suit" for its service requirements to apply. The law has been clear for one hundred years that states and their agencies are protected by the Eleventh Amendment; they are not subject to suit in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State . . . was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."). Only by suing a state official by name under the fiction of *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (stating that when sued for injunctive relief for violating the Constitution the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct"), can one avoid the Eleventh Amendment – and this is precisely because official-capacity suits are *not* suits against states.

This constitutional distinction between states and their officials was extended as a statutory matter to § 1983 litigation in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There, this Court ruled that states are *never* proper defendants under § 1983. Rather, a § 1983 plaintiff must sue a state official by name in his official capacity. This is proper "because 'official-capacity actions for prospective relief *are not treated as actions against the State*.'" *Id.* at 71 n. 10 (quoting *Kentucky v. Graham*, 473 U.S.

159, 167 n. 14 (1985); citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)) (emphasis added).[12]

Because the Fifth Circuit's conclusion contradicts that of the First and Second Circuits, and appears at odds with *Will*, certiorari is proper.

II. Preferring Abstention Over Certification Contradicts This Court's Instructions and Practices in Other Circuits.

This Court has urged the federal courts to utilize state certification procedures in constitutional cases rather than *Pullman* abstention.[13] In *Arizonans for*

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[12] Official-capacity actions against states and/or state officers for money damages are not cognizable under § 1983. *See Will*, 491 U.S. at 71. Thus, the *only* recognized official-capacity action against a state officer under § 1983 is that authorized by *Ex parte Young*. *See Will*, 491 U.S. at 71 n. 10. Of course, state officials can be sued for money damages as individuals. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). There is no question but that these "individual-capacity" actions are governed by Rule 4(e). If an individual-capacity action calls into doubt a state statute, Rule 5.1(a) requires that the state's attorney general be noticed. *See also* 28 U.S.C. § 2403(b) (providing that state must be allowed to intervene). *Compare* Federal Rule of Civil Procedure 4(i)(3) (federal officials sued in their individual capacities are subject to service as individuals under Rule 4(e) and United States must also be served).

[13] *Pullman* abstention is designed to allow federal courts to avoid needlessly resolving constitutional questions. *See* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974). Thus, it has no application to non-constitutional cases, including diversity actions.

Official English v. Arizona, 520 U.S. 43, 76 (1997), the Court explained that in constitutional litigation, "*Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court." (Citation omitted). "Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* (citations omitted).

Following *Arizonans*, several Circuits have endorsed certification over forcing § 1983 plaintiffs to file additional actions in state court pursuant to *Pullman*.[14] The Ninth Circuit, for example, observed in *Doyle v. City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009), that it prefers certification over abstention "in *Pullman*-type abstention cases 'because the alternative to certification is federal court abstention and the attendant delay until resolution of the

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[14] When parallel proceedings are already pending in state court, federal courts have sometimes used *Pullman* abstention as a more efficient alternative. *See, e.g., Currie v. Group Insurance Commission*, 290 F.3d 1 (1st Cir. 2002) (refusing to certify because state-law issue was pending in state courts); *Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee of State Bar of Texas*, 283 F.3d 650, 656-57 (5th Cir. 2002) (refusing to certify because two cases were pending in state courts involving same issue). But this "unusual circumstance" is not present here.

derivative state court . . . action (including trial, the right to a direct appeal, and the right to seek discretionary review after the direct appeal).'" (Citation omitted).

The Second, Tenth and Eleventh Circuits have likewise expressed preferences for certification over abstention in the absence of unusual circumstances. The Second Circuit trumpeted the benefits of certification in *Tunick v. Safir*, 209 F.3d 67, 73 (2d Cir. 2000): "*Arizonans* made quite clear that . . . the device of certification provides all the benefits of *Pullman* abstention . . . [and] therefore . . . that we should consider certifying in more instances than had previously been thought appropriate." *See also Allstate Insurance Co. v. Serio*, 261 F.3d 143, 151 (2d Cir. 2001) (observing in constitutional case that "the Supreme Court indicated that certification is usually preferable to abstention."). The Tenth Circuit in *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008), rejected *Pullman* abstention because "the Supreme Court has expressed a preference for certifying questions to a state's supreme court." The Eleventh Circuit explained its preference for certification in *Pittman v. Cole*, 267 F.3d 1269, 1289 (11th Cir. 2001): "[c]ertification . . . offers substantial benefits over the traditional *Pullman* abstention method. . . . '[It] save[s] time, energy, and resources and helps build a cooperative judicial federalism.'" (Citation omitted).

While not stating clear preferences, several other Circuits have certified state-law questions in

Pullman-type cases. *See, e.g., Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 304 (1st Cir. 2000); *PSINet, Inc. v. Chapman*, 317 F.3d 413, 415 (4th Cir. 2003); *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 509-10 (7th Cir. 1998).

The Fifth Circuit alone "has tended to avoid certification in favor of abstention." Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona: *A Survey of Federal Courts' Practices*, 87 DEN. U. L. REV. 139, 158 (2009). This is not necessarily because the Fifth Circuit objects to certification; after all, it routinely certifies state-law issues in diversity cases (where *Pullman* abstention is unavailable). *See, e.g., Huss v. Gayden,* 508 F.3d 240 (5th Cir. 2007); *National Union Fire Insurance Co. v. Mississippi Ins. Guar. Ass'n,* 507 F.3d 309 (5th Cir. 2007); *Bullock v. AIU Insurance Co.,* 503 F.3d 384 (5th Cir. 2007); *Paz v. Brush Engineered Materials, Inc.,* 445 F.3d 809 (5th Cir. 2006). Rather, it appears that the Fifth Circuit simply prefers *Pullman* abstention and the added obstacles it imposes on constitutional plaintiffs.[15]

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[15] Remarkably, there is *no* reported instance of the Fifth Circuit certifying a state-law question in a *Pullman*-type setting. *See* Thomas-Jensen, *supra*, at 158. *Cf. Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) (rejecting dissent's argument that state-law issue should be certified to Louisiana Supreme Court).

The Fifth Circuit offered no reason for its refusal to use Mississippi's certification procedure. Moreover, because Mississippi's procedure cannot be invoked by the District Court, *see* Miss. R. App. P. 20(a) (stating that only this Court and Courts of Appeals can certify), which has now followed the Fifth Circuit's advice and invoked abstention, Moore is forced to file a full round of needless and cumbersome litigation in Mississippi's courts. This inexplicable approach to constitutional litigation conflicts with the preference for certification expressed by this Court and several Circuits. Certiorari is proper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60272
consolidated with
No. 09-60424

BRIAN MOORE,

Plaintiff-Appellant,

versus

DELBERT HOSEMANN,
in His Official Capacity as
Mississippi Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Dec. 18, 2009)

Before JONES, Chief Judge, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Brian Moore sued the Mississippi Secretary of State (the "Secretary") after being left off that state's 2008 presidential ballot. The district court dismissed the suit as moot and denied Moore's motion for costs

and fees under Federal Rule of Civil Procedure 4(d)(2). We reverse the dismissal and remand because, although the case is not moot, we must abstain. Moore's challenge, like many election disputes, is based on an interpretation of uncertain state law, which should be resolved at the state level before we consider wading into a constitutional thicket. We affirm the denial of costs and fees.

I.

Moore was the 2008 presidential candidate for the Socialist Party USA and was also selected as the Natural Law Party's presidential candidate on the Mississippi ballot. Mississippi law requires all presidential candidates to submit their qualifying papers to the Secretary "not less than sixty days previous to the day of the election." MISS. CODE ANN. § 23-15-785(2). For the 2008 election, the sixty-day deadline fell on Friday, September 5. The statute does not explicitly provide a specific time of day by which a candidate's papers must be filed on the due date, but in accordance with another statute, the Secretary's office closes at 5:00 p.m.

On September 5, shortly after 5:00 p.m., taxi drivers hired by Moore arrived at the Secretary's office to deliver Moore's papers, but the office had closed. The drivers deposited Moore's papers at the

doorstep and left. Because Moore did not meet the filing deadline, his name was left off the ballot.[1]

On September 16, Moore sued Delbert Hosemann in his official capacity as Secretary, seeking a preliminary injunction to certify Moore for the presidential ballot and a preliminary and permanent injunction to prevent the Secretary from enforcing any unauthorized deadlines for ballot qualification of presidential candidates. Moore argued that his constitutional rights were violated when the Secretary imposed the deadline without express legislative authority. The district court denied Moore's request for a preliminary injunction on September 29. We subsequently denied Moore's motion for a stay and preliminary injunction. Moore appealed the denial of an injunction to this court but voluntarily withdrew his appeal after the election had occurred.

Though the opportunity for an injunction had ended, Moore continued to seek a declaratory judgment that the 5:00 p.m. deadline was unconstitutional. The district court granted the Secretary's motion to dismiss the complaint as moot under Federal Rule of Civil Procedure 12(c). In response to Moore's argument that his claim fell under the "capable of repetition, yet evading review" exception to mootness, the court found that there was no

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[1] Moore's vice-presidential running mate, Stewart Alexander, and the Natural Law Party were also parties. Moore alone appeals.

"reasonable expectation" or "demonstrated probability" that Moore or any other Natural Law Party presidential candidates would "again miss what they now know to be the 5:00 p.m. deadline" for filing. The court recognized that this circuit has applied the mootness exception when other individuals in the political process might challenge a law, but held that in the present matter it did "not seem reasonably likely that other prospective presidential/vice-presidential candidates will fail to timely file their qualifying papers before . . . the office closes at 5:00 p.m."

Moore moved for costs and fees pursuant to Federal Rule of Civil Procedure 4(d) on the theory that the Secretary had not satisfied a mandatory requirement to waive service. The district court denied the motion.

On appeal, Moore renews his arguments that his claim falls under the "capable of repetition, yet evading review" exception and that the 5:00 p.m. deadline is unconstitutional. Specifically, Moore contends that the Secretary exceeded his authority in violation of Article II, § 1, cl. 2 of the United States Constitution, which provides that each state shall choose presidential electors "in such manner as the *Legislature* thereof may direct." (Emphasis added.) The upshot of the unauthorized deadline, says Moore, is that Mississippi violated his and voters' First and Fourteenth Amendment rights to participate in the

political process. Moore also appeals the denial of his motion for costs and fees.[2]

II.

We first address whether this case is non-justiciable because the completion of the election renders it moot. We review questions of subject matter jurisdiction, including the justiciability issue of mootness, *de novo*. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006).

Mootness is "the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). "Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Ctr. for Individual Freedom*, 449 F.3d at 661. The Secretary contends that such is the case here, that the occurrence of the November 2008 election means that Moore can no longer seek meaningful redress for the constitutional violations he alleges.

An important exception to the mootness doctrine, however, is "attacks on practices that no longer

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[2] Two appeals were docketed: No. 09-60272, the appeal of the dismissal as moot; and No. 09-60424, the appeal of the dismissal of the motion for costs and fees. The appeals have been consolidated.

directly affect the attacking party, but are 'capable of repetition' while 'evading review.'" *Alvarez v. Smith*, No. 08-351, 2009 U.S. LEXIS 8941, at *10-*11 (U.S. Dec. 8, 2009) (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). To invoke that exception, a party must show that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life*, 551 U.S. at 462.

Moore satisfies the first prong: Election controversies are paradigmatic examples of cases that cannot be fully litigated before the particular controversy expires. *See Ctr. for Individual Freedom*, 449 F.3d at 661. We turn then, to the second prong. There is good reason to suppose that Moore might fail that requirement, because he has not averred that he is likely to run for President again.

Following the lead of the Supreme Court, however, in election cases we have applied the second prong somewhat loosely. In *Center for Individual Freedom*, *id.* at 662, we held that "even if it were doubtful" that the plaintiff would again be affected by the allegedly offending election statute, "precedent suggest[ed] that [the] case [was] not moot, because other individuals certainly [would] be affected by the

continuing existence" of the statute.[3] It is true that the Supreme Court's most recent election law decisions, *Davis v. FEC*, 128 S. Ct. 2759 (2008), and *Wisconsin Right to Life* both noted that the plaintiffs had alleged they would again be adversely affected by the complained-of law. But the Court still "has not . . . dismissed an election case as moot where the plaintiff failed to allege that he would be governed by the same flawed law in the next election." *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164 (5th Cir. 2009). Thus, we remain "unwilling to dismiss [a] case as moot when 'the issues properly presented, and their effects . . . will persist as the [restrictions] are applied in future elections.'" *Id.* at 165 (citing *Storer*, 415 U.S. at 737 n.8).

That is the situation here. The Secretary has made it plain that he intends to enforce the 5:00 p.m. deadline in future elections. He adds that the chance is very small that Moore or any other presidential candidate will miss the deadline again. That is beside the point, however. As long as the complained-of deadline is in place, future candidates in Mississippi will be subject to it and will need to conform to its demands. Thus, the effects of the deadline will

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[3] *Cf. Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) ("The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections.").

persist. Given the election law context, Moore's complaint satisfies both prongs of the mootness exception.

III.

Although Moore's constitutional claim survives mootness, we decline to reach the merits. Instead, we remand and urge the district court to consider whether to abstain on the basis of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

In *Pullman*, plaintiffs challenged, on both federal constitutional and state law grounds, the authority of the Texas Railroad Commission to issue a racially discriminatory order. The Supreme Court abstained from deciding the case, because it found that if Texas courts were to strike down the Commission's action on state law grounds, it would be unnecessary to decide the federal constitutional question.

As the Court later explained, the moral of *Pullman* was that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and 'needless friction with state policies.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (quoting *Pullman*, 312 U.S. at 500). "[F]or *Pullman* abstention to be appropriate . . . it must involve (1) a federal constitutional challenge to state action and (2) an

unclear issue of state law that, if resolved, would make it unnecessary for us to rule on the federal constitutional question." *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Committee,* 283 F.3d 650, 653 (5th Cir. 2002). In other words, "[g]enerally, *Pullman* abstention is appropriate only when there is an issue of uncertain state law that is fairly subject to an interpretation [by a state court] which will render unnecessary or substantially modify the federal constitutional question." *Baran v. Port of Beaumont Nav. Dist.,* 57 F.3d 436, 442 (5th Cir. 1995).

Pullman abstention is appropriate here. Moore challenges the Secretary's official actions on federal constitutional grounds. He alleges that by enforcing the 5:00 p.m. deadline without express direction from the legislature, the Secretary devised his own manner of appointing presidential electors, in violation of Article II. As a result, Moore claims, his First and Fourteenth Amendment rights to political participation were violated.

Moreover, the existence of a federal constitutional question is entirely contingent on an unresolved interpretation of Mississippi law. The Secretary argues that by closing his office at 5:00 p.m. he was not creating election rules, but merely following the existing laws enacted by the legislature. He points to provisions of the Mississippi Code that provide for regular office hours. All state offices, for example, are required to operate between 8:00 a.m. and 5:00 p.m., and the Secretary is required to operate eight hours each weekday. *See* MISS. CODE

ANN. §§ 25-1-98, 7-3-3. In the Secretary's view, then, he did not add to, or even interpret, the sixty-day deadline in § 23-15-785(2), but rather complied with the strict letter of three interrelated state statutes.

Moore contends that, to the contrary, because § 23-15-785(2) does not contain its own mention of a closing time, the Secretary was required to keep his office open until midnight on September 5. Moore points out that a number of other Mississippi election statutes do mention 5:00 p.m. filing deadlines and that presidential absentee ballots have a later receipt deadline than do ballots for other offices.[4]

The question of state law here is at least – and perhaps even more than – "fairly subject" to the Secretary's understanding. We abstain from deciding this question of state law prematurely, however, because an authoritative answer from the Mississippi courts in the Secretary's favor would also dispose of any federal constitutional question. We therefore remand the constitutional claim to the district court and urge it, likewise, to consider whether to abstain.

IV.

Moore claims he is entitled to costs and fees under rule 4(d), which requires certain defendants, upon request, to waive service, and which allows

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[4] *See* MISS. CODE ANN. §§ 23-15-299(3), 23-15-309(1), 23-15-359(3), 23-15-361(1), 23-15-721(3), 23-15-807(e), 23-15-637.

plaintiffs to cover expenses related to service if the defendant does not waive. The district court found that Moore's motion for costs and fees was without merit. We agree.

Rule 4's mandatory waiver provisions apply only to "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h)." FED. R. CIV. P. 4(d)(1). State governments, municipal corporations, and "other state-created governmental organization[s]," along with the federal government and foreign sovereigns, are not subject to mandatory waiver. As the 1993 Advisory Committee Note to rule 4(d) explains:

> The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail.

Moore argues that the Secretary, even when sued in his official capacity, should be considered an "individual" for purposes of rule 4's mandatory waiver provision. He is incorrect. The Advisory Committee Note expressly states that the rationale for shielding

the United States from the mandatory waiver-of-service provisions also applies to its "agencies, corporations, and officers" and similarly "to other governments and entities subject to service under subdivision (j)." Although neither the rule nor the Advisory Committee note attempts to define which state "entities" are similarly shielded from the mandatory waiver provisions, the most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position.

Nor is Moore's reliance on First Circuit caselaw persuasive. In two instances, that circuit held that state officials sued in their individual capacities should receive process as individuals under rule 4(e) (and its predecessor) rather than as state government entities under rule 4(j). *See Echevarria-Gonzalez v. Gonzalez-Chapel,* 849 F.2d 24 (1st Cir. 1988); *Caisse v. DuBois,* 346 F.3d 213 (1st Cir. 2003). Neither *Echevarria* nor *Caisse*, however, addressed whether a state official was subject to mandatory waiver obligations under rule 4(d); instead, both cases concerned whether plaintiffs had made adequate service on state official defendants. For the reason stated above, we disagree with the First Circuit's reading of rule 4, at least insofar as the First Circuit's reasoning

subjects state officers to the mandatory waiver provisions of the rule.[5]

A number of other courts have held that state officers sued in their official capacities are subject to service under rule 4(j) or its predecessor.[6] We join them in saying that a state official sued in his official capacity is not subject to the mandatory waiver-of-service provisions of rule 4(d). Thus, we affirm the dismissal of Moore's motion for costs and fees.

For the reasons explained, the judgment is AFFIRMED in part and REVERSED and REMANDED in part.

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[5] The parties placed great emphasis on the holding in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) that, for the purposes of a 42 U.S.C. § 1983 action for money damages, "a suit against a state official in his or her official capacity is a suit against the official's office," and also on the *dictum* that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983." *Will*, 491 U.S. at 71, 71 n.10. This emphasis on *Will* is misplaced. The question here is not about the definition of a "person" under § 1983, but rather the definition of an "individual" under rule 4.

[6] *See, e.g., Libertarian Party v. Dardenne*, 2009 WL 790149, at *5 (M.D. La. Mar. 24, 2009); *Mack v. Fox*, 2008 WL 4832995, at *3 (M.D.N.C. Nov. 4, 2008); *Chapman v. N.Y. State Div. for Youth*, 227 F.R.D. 175, 179-80 (N.D.N.Y. 2005); *Randall v. Crist*, 2005 WL 5979678, at *2 (N.D. Fla. Nov. 1, 2005); *Gaynor v. Martin*, 77 F. Supp. 2d 272, 282 (D. Conn. 1999); *Banerjee v. Roberts*, 641 F. Supp. 1093 (D. Conn. 1986).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BRIAN MOORE,
STEWART ALEXANDER
AND THE NATURAL LAW
PARTY OF MISSISSIPPI — PLAINTIFFS

VS. — CIVIL ACTION NO. 3:08CV573TSL-JCS

DELBERT HOSEMANN,
IN HIS OFFICIAL CAPACITY
AS MISSISSIPPI SECRETARY
OF STATE — DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Delbert Hoseman, in his official capacity as Mississippi Secretary of State, to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the basis that the case is moot and that plaintiffs therefore lack standing to pursue their claims herein. Plaintiffs Brian Moore, Stewart Alexander and the Natural Law Party have responded in opposition to the motion and the court, having considered the memoranda of authorities submitted by the parties, concludes that defendant's motion is well taken and should be granted.

In order to be included on the ballot as presidential and vice-presidential candidates, Mississippi law requires that candidates file their qualifying documents with the office of the Secretary of State

not less than sixty days prior to the day of the general election. Miss. Code Ann. § 23-15-785(2). Thus, for the November 2008 general election, September 5, 2008 was the last day on which candidates could file their documentation with the Secretary of State. Plaintiffs attempted to do this, but when they arrived at the Secretary of State's office shortly after 5:00 p.m., the office was closed and the Secretary of State refused to accept their qualifying papers.

Plaintiffs filed this action on September 16, 2008, along with an accompanying motion for temporary restraining order and preliminary injunction, seeking to enjoin defendant to include them on the ballot, contending that defendant's refusal to accept their qualifying papers violated their rights under the United States Constitution. Specifically, plaintiffs charged that by closing his office at 5:00 p.m. when the statute establishing the qualifying deadline specified only a date by which the papers were to be filed but not a time by which they had to be filed, defendant unconstitutionally usurped the role of the Legislature, in violation of Article II, § 1, cl. 2, under which only the state "Legislature" can prescribe rules for presidential elections. They further charged that defendant's actions deprived them of a reasonable opportunity to qualify for the ballot and thereby violated their rights under the First and Fourteenth Amendments.

Following a hearing, the court ruled from the bench, and later entered a written opinion and order denying plaintiffs' request for an injunction upon

finding that plaintiffs had failed to demonstrate a likelihood of success on the merits of their claims. The court opined as follows:

First, that the Secretary of State's decision to close his office at the traditional hour of 5:00 p.m. when such a deadline is not explicitly set forth in Section 23-15-785(2), was reasonable and was not inconsistent with the state's election statutes and hence was not a usurpation of the Mississippi Legislature's authority under Art. II, § 1, cl. 2 to direct the manner of appointment for presidential electors;

Second, that defendant's decision to close at 5:00 p.m. did not violate plaintiffs' due process rights because even if the decision was contrary to state law (which this court did not consider that it was), consistent with state law, it was not one of the "rare, but serious, violations of state election laws that undermine the basic fairness and integrity of the democratic system" warranting relief under the Fourteenth Amendment;

Third, that plaintiffs' argument that the Secretary of State was estopped from refusing the qualifying documents because the Secretary's office allegedly stated to Mr. Moore that a late filing would be accepted did not support application of the doctrine of constitutional estoppel; and

Lastly, that once the court had disposed of plaintiffs' constitutional claims, it would not likely retain jurisdiction over plaintiffs' state law-related

claims, particularly since the Eleventh Amendment does not allow for any relief, prospective or otherwise, to be granted in federal court solely on the basis of state law violations.

Plaintiffs appealed this court's order, but after the Fifth Circuit denied their motion for a stay pending appeal and preliminary injunction, plaintiffs voluntarily dismissed their appeal. When plaintiffs thereafter served defendant with process, indicating their desire to pursue their claims herein notwithstanding that the election had concluded, defendant filed his motion to dismiss, contending therein that since the 2008 election has already occurred, plaintiffs lack standing and their claims have become moot.

> Article III restricts federal courts to the resolution of cases and controversies. That restriction requires that the party invoking federal jurisdiction have standing – the "personal interest that must exist at the commencement of the litigation." But it is not enough that the requisite interest exist at the outset. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'"
>
> . . .
>
> [T]he requirement that a claimant have "standing is an essential and unchanging part of the case-or-controversy requirement

> of Article III." To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.

Davis v. Federal Election Com'n, 128 S. Ct. 2759, 2768 (2008) (citations omitted).

> "Mootness" is 'the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents.
>
> . . .
>
> As a general rule, "any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." A case should not be declared moot "[a]s long as the parties maintain a 'concrete interest in the outcome' and effective relief is available to remedy the effect of the violation. . . ." But a case will become moot where "there are no longer adverse parties with sufficient legal interests to maintain the litigation" or "when the parties lack a legally cognizable interest in the outcome" of the litigation. As the Supreme Court has noted, "it is not enough that a dispute was very much alive when the suit was filed; . . . [t]he parties must continue to

> have a personal stake in the outcome of the lawsuit."

Environmental Conservation Organization v. City of Dallas, 529 F.3d 519, 524-525 (5th Cir. 2008) (citations omitted).

In the case at bar, since the 2008 election is over, plaintiffs are no longer involved in any case or controversy relating to the 2008 election ballot. Accordingly, their claim for injunctive relief is obviously moot since plaintiffs sought only to preliminarily enjoin defendant to certify them for the 2008 ballot and to preliminarily and permanently enjoin defendant "from enforcing *in 2008* any deadline for the qualification of recognized political parties' presidential candidates." (Emphasis added). In sum, the fact that the 2008 elections have been concluded renders moot plaintiffs' claim for injunctive relief.

Plaintiffs have also sought a declaratory judgment declaring defendant's effective imposition of a 5:00 p.m. deadline on the qualifying date established by the state legislature unconstitutional. In the court's opinion, however, there is no longer any controversy between parties having adverse interests of sufficient immediacy and reality to warrant the requested relief.

When considering the potential mootness of a claim for declaratory relief, "[t]he question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient

immediacy and reality to warrant the issuance of a declaratory judgment.'" *Super Tire Eng'g Co. v. McCorkle,* 416 U.S. 115, 122, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)). The court should also consider the related question whether the issues are "capable of repetition, yet evading review," which is one of the recognized exceptions to the mootness doctrine. This exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Federal Election Com'n v. Wisconsin Right To Life, Inc.,* 127 S. Ct. 2652, 2662 (2007). "The second prong of the 'capable of repetition' exception requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Id.* (citation omitted). The Supreme Court has found that "the same controversy sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality,'. . . ." *Id.* at 2663 (2007). *See Nautilus Ins. Co. v. Nevco Waterproofing,* 202 Fed. Appx. 667, 668-669, 2006 WL 2920596, 1 (5th Cir. 2006) (finding "capable of repetition yet evading review" exception inapplicable because "the possibility that Concierge (defendant) might sue Nevco (plaintiff) in the future is not of 'sufficient immediacy and reality' to warrant a declaratory judgment"). In the court's opinion, there is no

"reasonable expectation" or "demonstrated probability" that these plaintiffs, or any prospective Natural Law Party candidates for president and vice-president, will again miss what they now know to be the 5:00 p.m. deadline for filing their qualifying papers.[1] *Cf. Presnick v. Bysiewicz*, 297 F. Supp. 2d 431, 435 (D. Conn. 2003) (denying exception where "Plaintiff has not adequately demonstrated that he will again run for office, that he will be the only candidate running against an otherwise unopposed incumbent, and that plaintiff will fail to fulfill the petition requirements pursuant to § 9-453d").

The court acknowledges plaintiffs' argument that the Fifth Circuit has held in the context of election law challenges that in considering whether the "reasonable expectation that the same complaining party would be subject to the same action again," the court "does not always focus on whether a particular

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[1] Plaintiffs argue that the proper inquiry is not whether it can reasonably be expected that they (or anyone else) might miss defendant's 5:00 p.m. deadline, but rather is whether there exists a reasonable expectation that defendant "might again attempt to regulate presidential elections." The court rejects plaintiffs' position for plaintiffs themselves have not contended that defendant has attempted to regulate presidential elections in any way other than by closing his office at 5:00 p.m. on the date of the qualifying deadline established by the legislature. Even if that were the inquiry – which it is not – plaintiffs have offered no basis for any reasonable expectation that the Secretary of State would in the future undertake to usurp the legislative function with respect to the conduct of presidential elections.

plaintiff is likely to incur the same injury," and that it is instead enough that "other individuals" in the political process might challenge the law in the future. *See Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (finding that "even if it were doubtful that the [plaintiff] would again attempt to engage in election related speech in Louisiana, precedent suggests that this case is not moot, because other individuals certainly will be affected by the continuing existence of the [challenged laws]"). However, even if the proper focus were not necessarily limited to whether these particular plaintiffs will be subject to the same action again,[2] in the court's opinion, it does not seem reasonably likely that other prospective presidential/vice-presidential candidates will fail to timely file their qualifying papers before the Secretary of State's office closes at 5:00 p.m. on the date of the qualifying deadline.[3]

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[2] In two cases since *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006), was decided, the Supreme Court has reiterated that the party seeking to establish the "capable of repetition yet evading review" exception must establish that "there is a reasonable expectation that the same complaining party will be subject to the same action again." *See Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2663 (2007), and *Davis v. Federal Election Com'n*, 128 S. Ct. 2759, 2770 (2008).

[3] In this vein, the court notes that plaintiffs' problem arose because they missed the deadline, not because they were unaware of the deadline. Plaintiffs knew the office closed at 5:00 p.m. and simply failed to get there in time.

For these reasons, it is ordered that defendant's motion to dismiss is granted.

SO ORDERED this 10th day of March, 2009

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BRIAN MOORE,
STEWART ALEXANDER
AND THE NATURAL LAW
PARTY OF MISSISSIPPI — PLAINTIFFS

VS. — CIVIL ACTION NO. 3:08CV573TSL-JCS

DELBERT HOSEMANN,
IN HIS OFFICIAL CAPACITY
AS MISSISSIPPI SECRETARY
OF STATE — DEFENDANT

ORDER

This cause is before the court on the motion of plaintiffs Brian Moore, Stewart Alexander and the Natural Law Party for costs and attorney's fees pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure. Defendant Delbert Hoseman, in his official capacity as Mississippi Secretary of State, has responded in opposition to the motion, and the court, for the reasons assigned in defendant's response, concludes that plaintiffs' motion is patently without merit and should be denied.

Accordingly it is ordered that plaintiffs' motion for costs and attorney's fees is denied.

SO ORDERED this 14th day of May, 2009.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60272

Consolidated With 09-060424

BRIAN MOORE,

Plaintiff-Appellant [3:08cv573]

versus

DELBERT HOSEMANN, In his official capacity as Mississippi Secretary of State,

Defendant-Appellee

Appeals from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING

(Filed Jan. 18, 2010)

Before JONES, Chief Judge, SMITH and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jay Smith
United States Circuit Judge